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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-873

PATRICK STAUNTON, INDIVIDUALLY AND AS CHICAGO AREA ZONE DIRECTOR, H. C. PIEPENBRINK, INDIVIDUALLY AND AS MANTENO STATE HOSPITAL SUPERINTENDENT, AND JOHN F. BRIGGS, INDIVIDUALLY AND AS ACTING DIRECTOR OF THE ILLINOIS STATE DEPARTMENT OF MENTAL HEALTH,

Petitioners,

vs.

JOSEPH L. DONAHUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The petitioners, Patrick Staunton, individually and as Chicago Area Zone Director, H. C. Piepenbrink, individually and as Manteno State Hospital Superintendent, John F. Briggs, individually and as acting Director of the Illinois State Department of Mental Health, by their attorneys, William J. Scott, Attorney General of the State of Illinois, and Perry L. Fuller, Special Assistant Attorney General, respectfully pray for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to reverse its judgment affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is still unreported but appears at pages A1-A24 of the appendix. The findings of fact and conclusions of law and judgment order of the trial court have not been reported, but appear at pages A25-A30 of the appendix to the petition.

JURISDICTIONAL STATEMENT.

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 6, 1972. A timely petition for rehearing filed on July 20, 1972, was denied on September 15, 1972. The jurisdiction of this court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

With respect to a charge that freedom of expression has been abridged and redress sought under 42 U. S. C. § 1983, the following questions are presented:

1. Is there any immunity—qualified or otherwise—for individuals serving the Executive Branch of State Government?

2. Judgment is required to weigh the rights of the individual against the interest of the public. If judgment on the part of individuals serving the Executive Branch is permitted, but subject to review, does a substitution of Judicial judgment to replace Executive judgment, automatically carry with it a finding that the Executive acted in bad faith?

3. Does *Jenson* v. *Olson*, 8 Cir. 353 F. 2d 825 (1965) have any validity? Is there a conflict between circuits and circuit judges to be resolved?

4. Can a Court of Appeals make a specific finding of fact which the District Court did not find and which was essential to support the District Court's decision?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED.

U. S. CONST. AMEND. 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. CONST. AMEND. 14, SECT. 1:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CIVIL RIGHTS ACTS, SEC. 1 of the Act of April 20, 1971, c. 22, 17 Stat. 13, 42 U. S. C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE.

The respondent Joseph L. Donahue filed a complaint against the petitioners, Patrick Staunton, individually and as Chicago Area Zone Director, H. C. Piepenbrink, individually and as Manteno State Hospital Superintendent, John F. Briggs, individually and as acting Director of the Illinois State Department of Mental Health alleging that the petitioners had violated his rights of free speech under the First and Fourteenth Amendments to the Constitution of the United States when, acting under color of law, they discharged respondent from his position as Chaplain at Manteno State Hospital. Respondent sought relief pursuant to Title 42 U. S. C. § 1983. Jurisdiction was established pursuant to Title 28 U. S. C. § 1343(3).

After a bench trial, the District Court found in favor of the respondent and entered a judgment which awarded punitive damages, costs and attorney's fees and ordered petitioners to offer respondent full and unconditional reinstatement of his position. (Pet. App. A29-A30)

The petitioners appealed from this judgment to the United States Court of Appeals for the Seventh Circuit which affirmed, with Judge Swygert dissenting. (Pet. App. A31)

Petitioners' petition for rehearing and request for rehearing *en banc* were denied. (Pet. App. A32)

The facts are as follows:

Plaintiff-Respondent.

The State of Illinois obtains services of a Roman Catholic Chaplain at Manteno State Hospital by a request addressed to the Provincial of the Order of St. Viater. In

June of 1964, the Provincial of the Clerics of St. Viator removed the incumbent Chaplain and in his place assigned the respondent, Joseph L. Donahue, as Resident Catholic Chaplain at Manteno State Hospital, near Kankakee, Illinois. (App. 44, 67 and 71-72)

As Catholic Chaplain at Manteno State Hospital respondent administered to the spiritual life of the patients of Roman Catholic faith. (App. 44) He was not a social worker at Manteno State Hospital. (App. 122) At the same time, respondent was the Chaplain for the Chicago Building Trades Council and a delegate to the Illinois and Chicago Federations of Labor for the Wood, Wire and Metal Lathers Union. (App. 70-71)

One of the responsibilities of the Chaplain was to address professional and lay groups to promote understanding of the problems and obligations concerning patients and interpret the institution's problems and policies to the public. Respondent understood that this was one of his responsibilities. (App. 77 and Supp. App. 17)

Respondent's association with Manteno State Hospital was terminated on December 4, 1969. (App. 61-62)

Defendants-Petitioners.

Petitioner Patrick Staunton is a licensed physician and a diplomat of the American Board of Psychiatry and Neurology and a fellow of the American Psychiatric Association. (App. 157-158) He is the Chicago Area Zone Director of the Illinois Department of Mental Health. (App. 155)

Petitioner Harold C. Piepenbrink has a Masters Degree in Hospital Administration from Northwestern University. He had been an associate administrator of D. C. General Hospital in Washington, D. C. and returned to Illinois to organize new Zone Centers. In March of 1967, he be-

came Superintendent at Manteno State Hospital. (App. 164) On September 1, 1970, he became Superintendent of Tinley Park Mental Health Center. (Supp. App. 2)

Petitioner John F. Briggs was the acting Director of the Illinois Department of Mental Health on December 4, 1969. On April 1, 1970, he became Deputy Director of the Department of Mental Health. (Supp. App. 1 and 2)

ELEMENTS OF THE CASE.

I. Alleged Protected Speech.

A. The following are some quotes from the respondent's exercise of his freedom of speech which he considers cannot validly be the basis for his discharge.

1. Speech in 1966.

   a. "Father Donahue urged an end to these 'fly-by-night ideas', more custodial care and the reinstallation of security wards. He said there are none now." (Supp. App. 23)

   b. "Such individuals . . . force their theories into the movement and . . . use human beings as guinea pigs." (Donahue speech September 27, 1966; Def. Exhibit 4; Supp. App. 57)

   c. "It is a program for the beasts of the fields and not for God's defenseless children." (Supp. App. 57)

   d. "Here the program is to push the outside world upon the patients without thought of their inability to act as the normal individual on the outside." (Supp. App. 57)

   e. "I have charged the present program with creating a free love situation that condones criminal acts. . . ." (Supp. App. 59)

   f. "As the result of his (Dr. Rubin's) opening the doors for patients to mix I relate this one incident. . . ." (Supp. App. 60)

2. Speech in 1969.

a. Respondent's advertisement in the Kankakee Daily Journal, November 13, 1969 directed to alleged neglect and abuse at Manteno State Hospital.

"1. The piling of bodies (male upon females) upon one another in the Morgue Vaults.

2. Neglect of Morgue refrigeration, causing decay of bodies before Burial: Recently a couple travelled over 60 miles to attend Morgue Funeral of a relative, were unable to view deceased. Undertaker was unable to properly embalm the decomposed body.

3. Little, or no effort on part of authorities to prevent runaways: Some runaways have died in nearby fields, where their bodies were torn apart and eaten by the birds and animals of the fields. (It would be humane if they were dead before the beasts came upon them.)

4. One Patient complained she was ill. Suddenly she was violently ill and moved to the Acute Hospital where she died one hour later. Perforated ulcerated colon, peritonitis had had set in. Proper examination of patient in the Acute Hospital on first complaint may have saved her life. Mother of this patient was not notified of the girl's illness. She became very disturbed and upset when notified of her daughter's death.

5. January 1969 a Patient was found to have a Cancer of the Nasal cavity. In March 1969 a biopsy was performed. The Patient was ordered to be sent to the Illinois Eye and Ear Infirmary, Chicago, a transfer that was not made until late August, 1969. Why the delay! The Doctor at the Infirmary complained of the terrible manner that Manteno State Hospital neglected its patients. (Great loss of weight, difficulty in swallowing, dehydration, and so weak he could not stand.)

6. Self Medication program, where Patients are given the responsibility to take their own medication. No

Nurses or certified Aides on the program. (The legality of such a program is questionable.)

7. A Patient struck in face by another patient bled profusely. Unable to stop flow because Manteno State Hospital lacked the facilities. Time was a factor. Patient was moved to a Hospital 50 miles away where he died. In such an emergency the question is "why the facilities of the local Hospitals were not used?"

8. Many patients are untidy because of organic reasons. Frequently they are placed on Wards with tidy patients. Some Physicians believe these organic conditions are most infectious. Visitors (of all ages) to these Wards are often exposed to Male and Female patients sitting around naked slopping in their feces.

9. Birth control Pills issued, as admitted by member of the Hospital pharmacy committee, only to prevent pregnancies of highly promiscuous patients.

10. Aides on Wards where young male and female patients reside complained to the Authorities "male patients abuse the female ones." "Wards are not safe for patients or employees." What must we do when female patients ask help because male patient bother them? The Doctor replied: "Tell the men to leave the women alone."

11. A known hostile, aggressive and frequent runaway patient has twice in four months stole sets of Hospital keys and car keys from careless employees and stole two automobiles.

12. Some Mittimus cases have privilege of the Hospital grounds. One was permitted a Home Visit. (Illegal?)"

b. Respondent's answers at trial to charges he made in a 1969 television program

"Q. On that progam, did you also make the statement that the main cause of death is dehydration because patients cannot get to a drinking fountain?

"A. Yes." (App. 124)

"Q. Have you had occasion to investigate either through death certificates or autopsies or any other means the cause of deaths?

"A. I got a report from the hospital every month in regard to various deaths and so-called causes. All one had to do was to look at that and see the number of dehydrations reported.

"Q. And do you recall in any of those reports, do you recall approximately how many deaths were due to dehydration?

"A. No.

"Q. Did any of these reports indicate that the dehydration was the cause by failure to get to a drinking fountain?

"A. No." (App. 127-128)

B. The respondent considered the 1966 charges as valid in 1969 as they were in 1966.

"Q. Were there any differences that you had in your mind, Father Donahue?

"A. I find very few.

"Q. Very few differences, is that right?

"A. Yes.

"Q. Would the comments which you made in 1966 be considered by you to be valid in 1969?

"A. I believe so." (App. 135-136)

II. The Alleged Protected Speech of Respondent Was False, Inaccurate and Sensational.

A. The Governor of the State of Illinois asked the Board of Mental Health Commissioners to investigate the respondent's charges. The Board of Mental Health Commissioners filed a report to the Governor on October 20, 1966 (Supp. App. 34-54). This report was in answer to respondent's 1966 charges, as admitted by respondent at trial:

"Q. And it is recognized that this report and this study was provoked as a result of charges which you made against the hospital, is it not?

"Q. That is right." (App. 76)

This report found the following with regard to respondent's 1966 charges:

a. "But it is difficult to understand how a labor union which consists of professional and non-professional employees, committed to providing the best mental health program for patients, should lend themselves to the promulgation of exaggerated and in certain cases unfounded accusations." (Supp. App. 46-47)

b. "The charge that birth control pills are being purchased in large quantity and indiscriminately dispensed is wholly unfounded." (Supp. App. 42)

c. "There is some reason to believe that a higher standard of sexual abstinence was being applied to a mentally ill population than to society at large." (Supp. App. 40-41)

d. "It is true patients will occasionally get into trouble, but it is doubtful whether the incidence of this type of behavior is greater than that which would occur in any hospital population of such dimensions. The choice is between accepting this risk, or insisting on the "closed door" policy which, it is agreed, retards recovery and would put the Illinois mental health program back 25 years. The consequences of a 'closed door' policy are well documented. Not only are individual patients impeded in their return to the community as functioning and productive citizens, but there is also an increased burden to the state from the longer stay at hospitals." (Supp. App. 48-49)

e. Because the patients at Manteno State Hospital had access to daily newspapers and television (App. 166) the report also found that "the publicity has been tragic for the patients". (Supp. App. 47)

B. **In regard to respondent's 1969 speech, he responded as follows at trial when asked to substantiate his charges:**

1. Respondent's charge published in advertisement.

"A Patient struck in face by another patient bled profusely. Unable to stop flow because Manteno State

Hospital lacked the facilities. Time was a factor. Patient was moved to a Hospital 50 miles away where he died. In such an emergency the question is "why the facilties of the local Hospitals were not used?" (Supp. App. 26)

EVIDENCE:

"Q. Father, do you know what is required to stop bleeding such as you observed?

"A. No, I don't." (App. 100)

"Q. Did anybody say, 'We are unable to stop it here at Manteno', or words to that effect?

"A. I don't remember." (App. 101)

"Q. Which facilities were lacking at Manteno State Hospital?

"A. I don't know which facilities were lacking." (App. 102)

2. Respondent's charge published in advertisement.

"Self Medication program, where Patients are given the responsibility to take their own medication. No Nurses or certified Aides on the program. (The legality of such a program is questionable)." (Supp. App. 26)

EVIDENCE:

"Q. In item 6 with respect to self-medication, do you know what type of medication was involved?

"A. No, I do not.

"Q. And were you aware of what dosages were involved?

"A. No, I was not.

"Q. And you don't know how long a period of time that this medication was supposed to be given?"

"A. For what patient?

"Q. Well, let me refresh your memory on this:

"Q. Then your answer would be you don't know over how long a period of thime this medication they were given was supposed to last?

"A. That is right.

"A. That is right." (App. 103)

3. Respondent's charge published in advertisement.
"Birth control Pills issued, as admitted by member of the Hospital pharmacy committee, only to prevent pregnancies of highly promiscuous patients." (Supp. App. 26)

EVIDENCE:

"A. As Catholic Chaplain I thought that the use of birth control pills assisted the promiscuous patients to practice their promiscuity.

"By Mr. Fuller:

"Q. Were these patients of such a state of mind that they could make such subtle judgments?

"A. I wouldn't know." (App. 113)

Only one patient was receiving such pills. (App. 122 and R. Plf. Ex. 12 and 13)

"Q. Now, as a matter of fact, your feeling with respect to the question of promiscuity and the use of birth control pills was a criticism which you have made not only in '69 but earlier.

"A. That is right.

"Q. And which was the subject of the investigation of 1966, prompted by your charges and your interviews and your insistence.

"A. One of the subjects." (App. 114)

4. Respondent's charge published in advertisement:
"Many patients are untidy because of organic reasons. Frequently they are placed on Wards with tidy patients. Some Physicians believe these organic conditions are most infectious. Visitors (of all ages) to these Wards are often exposed to Male and Female patients sitting around naked slopping in their feces." (Supp. App. 26)

EVIDENCE:

"Q. With respect to the problem we spoke about, Father Donahue, the patients with the untidiness and with the bowel problems, would it be correct to say that you do not know how many patients were involved in that sort of situation at the hospital?

"A. That is right, yes, sir.

"Q. And insofar as their introduction into the wards where the tidy patients were, it would be very few in number, would it not, in terms of mixing them with the tidy patients?

"A. Yes, it would." (App. 120)

Also, prior to respondent's termination, a newspaper reporter in respondent's presence made an inspection of the wards at Manteno State Hospital and reported in the Kankakee, Illinois newspaper that he could not find any evidence of the conditions that respondent had described. (App. 89-90)

III. The Impact of Respondent's Exercise of Free Speech Adversely Affected the Hospital Administration and Patients.

"As one (patient) phrased it, 'It is bad enough to be labeled a mental patient without being labeled an immoral mental patient'. The more we focus on sin and immorality with a population already disturbed and carrying a burden of guilt, the less we accomplish from a therapeutic standpoint. Estimates are that it will take a year to repair the damage done to the patients and their relatives, and to restore their pride and that of the employees." (Supp. App. 47)

* * * * *

"It is to be regretted that the difficulty of recruiting additional personnel has been compounded by the tactics of . . . introducing sensationalism in the charges . . ." (Supp. App. 46)

"At a time when the labor market is tight and finding suitable replacements is extremely difficult it is indeed confusing that Father Donahue would undertake a vilification of the hospital on matters that have already been proven to be either exaggerations or falsehoods." (Supp. App. 69)

* * * * *

"Alarming potential employees will not assist the hospital in meeting current challenges and providing the best possible care to our patients." (Supp. App. 69)

In this posture the respondent claims that the first amendment protects his false, inaccurate and sensational statements which adversely affected patient care and morale at Manteno State Hospital. It is in this historical context that respondent was discharged. It is in this historical context that the District Court ordered the respondent offered reinstatement and assessed compensatory and punitive damages against petitioners. It is in this very same historical context that petitioners pray that a writ of certiorari be granted.

ARGUMENT.

I.

THERE IS A NEED FOR THIS COURT TO RESOLVE THE VITAL QUESTION OF THE NATURE OF THE IMMUNITY OF OFFICIALS OF THE EXECUTIVE BRANCH IN CIVIL RIGHTS ACTS LITIGATION.

There is confusion in the circuits concerning qualified immunity for state officials of the Executive Branch. *Norton* v. *McShane,* 5 Cir., 332 F. 2d 855, 860-861 (1964); *Franklin* v. *Meredith,* 10 Cir., 386 F. 2d 958, 960 (1967); *Martone* v. *McKeithen,* 5 Cir., 413 F. 2d 1373, 1375 (1969).

Those serving the three co-equal branches of our government are not co-equal when it comes to immunity. Judges and legislators are given absolute immunity from suits even where violations of civil rights are concerned. *Tenney* v. *Brandhove,* 341 U. S. 367, 376, 71 S. Ct. 783, 95 L. Ed. 1019 (1951); *Pierson* v. *Ray,* 386 U. S. 547, 554-555, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967).

Any caprice in drafting a law or interpreting a law was more tolerable to society than operating courts and legislatures under the pistol point of a law suit. Absolute immunity was in order.

The Executive branch harbored the potential for the abuse of civil rights. While executive officials must exercise discretion and make judgments within a range no less broad than a judge, still the protection of appeal and the public scrutiny present in judicial and legislative proceedings were not always available regarding executive conduct.

It was necessary to limit immunity to permit an aggrieved person to show that the executive official abused his discretion and that it would be unfair to protect that official

by granting immunity (enforcing an unjustified decision) where he had acted in bad faith.

Thus, a plaintiff would have recourse under Sec. 1983 to reverse, modify, or vacate the decision of a state official if the plaintiff could show that the decision was not justified, i.e., an unreasonable or unjustified abridgment of the plaintiff's civil rights, and that in so acting the official did so in bad faith.

When an alleged civil rights violation was to be evaluated, two tests were necessary:

1. The discretionary act complained of must be tested by weighing the interests of the public against the rights of the individual to decide whether the discretionary act was justified;

2. If the interests of the public appear to be less important than the preservation of one or more of our basic individual freedoms, then a determination should be made as to whether the public official acted in bad faith.

A District Judge should not be permitted to apply only the first test. If a District Judge can substitute his judgment for that of the elected or appointed executive officer, then all of the hazards and dilemmas stated in *Barr* v. *Matteo*, 360 U. S. 564, 571-572, 3 L. Ed. 2d 1434; 79 S. Ct. 1335 (1959) confront all state officials in the Executive Branch.

The reason the Congress and the courts have chosen to limit the immunity extended to members of the Executive Branch is to prevent acts of bad faith, not acts of bad judgment.

The courts have drawn a broad distinction between bad faith and bad judgment. *Detender* v. *American Universal Insurance Co.*, 6 Cir. 1967, 372 F. 2d 50, 53; *Balducci* v. *Strough*, 239 N. Y. S. 611, 615, 135 Misc. 346 (1929); *Neel* v. *Barnard*, 150 P. 2d 177, 184, 24 Cal. 2d 406 (1944);

Burnham v. *Commercial Casualty Ins. Co.*, 117 P. 2d 644, 646, 648, 10 Wash. 2d 624 (1941); *Spiegel* v. *Beacon Participations*, 8 N. E. 2d 895, 907, 297 Mass. 398 (1937).

To equate bad judgment with bad faith is to wipe out any form of immunity for members of the Executive Branch of State government.

This is the practical effect of the Seventh Circuit's decision in this case and in *McLaughlin* v. *Tilendis*, 7 Cir. 398 F. 2d 287 (1968).

After noting that the District Court did not make a finding that petitioners had acted in bad faith, the court said:

> ". . . However, it is a necessary implication of the court's decision and judgment against the defendants that they acted without justification in the case at bar. 'At best, defendants' qualified immunity in this case means that they can prevail only if they show that plaintiffs were discharged on justifiable grounds. Thus, here a successful defense on the merits merges with a successful defense under the qualified immunity doctrine.' McLaughlin at 290-1." (Pet. App. A12)

If the plaintiff was, as the dissenting opinion holds, discharged on justifiable grounds, then the defendants do not need to wrap themselves in any immunity.

If the plaintiff was, as the majority opinion holds, discharged without justification, then the qualified immunity should be applied to determine if the unjustified discharge was done in bad faith and therefore justify the intrusion of the court into the affairs of the State.

Donahue is in conflict with this court's decision in *Pierson* v. *Ray*, 386 U. S. 547, 18 L. Ed. 2d 288, 87 S. Ct. 1213 (1967). In that case this court upheld the common law immunity of judges and legislators and held that police officers have a qualified immunity based on good faith and probable cause. 386 U. S. at 554-557.

The petitioners in this case, like the police officers in *Pierson*, are officials of the Executive Branch of government. The petitioners were found by the trial court to be acting within their authority and capacity as officials and agents of the State of Illinois and the respondent had so stipulated. (App. 33 and 41) As the Seventh Circuit noted, it was conceded that respondent's position with the hospital was exempt under the Illinois Personnel Code so that he could be discharged at the petitioners' discretion. (Pet. App. A7)

II.

THE SEVENTH CIRCUIT HAS DRASTICALLY CHANGED THE REQUIREMENTS OF PROOF TO JUSTIFY AWARDING PUNITIVE DAMAGES AND HAS SHIFTED THE BURDEN OF PROOF TO THE DEFENDANT TO REQUIRE HIM TO PROVE HIMSELF INNOCENT.

If *Donahue* is permitted to stand, then every member of the Executive Branch of State government is vulnerable not only to the challenge to his decisions, but subject to having punitive damages assessed against him if a District Judge simply disagrees with his judgment.

The District Judge considered his judgment as to what was of concern to mental patients and their families superior to the judgment of specialists in the field. He was not weighing legal concepts, but values as applied to an enlightened program for the mentally insane.

What is even more ironic in a case in which individual rights are the basis for the majority opinion, is the holding that in an action seeking punitive damages the defendants have the burden of proving themselves innocent. Any immunity was dependent upon *defendants* "show(ing) that plaintiffs were discharged on justifiable grounds." (Pet. App. A12)

The District Judge's findings were augmented by the Seventh Circuit which made a finding of bad faith on the

part of petitioners. Bad faith was, therefore, derived from the stated failure of the petitioners to prove that the discharge was justified.

Having found bad faith by this route the Seventh Circuit declared this sufficient upon which to base punitive damages.

The Court of Appeals said: "Defendants question the award of punitive damages. Their concern is without foundation. Since we have found that defendants acted in bad faith, the award of punitive damages was within the sound discretion of the trial court." (Pet. App. A12-A13)

The plaintiff had made no effort to prove bad faith, did not plead it, argue it, or include it in any draft for findings and conclusions, but, nevertheless, is awarded punitive damages.

This is in direct conflict with decisions from other circuits.

The Fifth Circuit in *Lee* v. *Southern Homesites Corporation*, 5 Cir., 429 F. 2d 290, 294 (1970) said that punitive damages in an action under 42 U. S. C. § 1983 "may be imposed if a defendant has acted wilfully and in gross disregard for the rights of the complaining party" and because such damages are assessed as an example and warning to others, they are not a favorite of the law and are allowed only with caution.

A District Court in *Urbano* v. *McCorkle*, 334 F. Supp. 161, 170 (D. N. J. 1971) said:

> Punitive damages should not be awarded in a § 1983 proceeding unless there is a showing that the prescribed action has been a constant pattern or practice of behavior of defendants and that such practice has been wilful and in gross disregard for the rights of the plaintiff.

As with the question of immunity the question of punitive damages is of considerable importance. In conducting the affairs of their offices, public officials similar to petitioners are making discretionary judgments. It is a rare judgment which does not adversely affect at least some individuals. No one's judgment is infallible, and it not infrequently occurs that the judgment of a public official is questioned. In this case the District Court and Court of Appeals questioned the judgment of the petitioners that the efficient operation of the hospital and resulting benefit to the patients outweigh the respondent's right to continue making critical statements while a Chaplain at the hospital.

A court decision which subjects public officials caught in that circumstance to punitive damages has broad import. The recruitment of capable public servants will be made more difficult. The vigorous and effective administration of government will be diminished.

To protect themselves against the harassment of such suits and the imposition of punitive damages, state officials would be faced with the following options:

1. Resign, if employed
2. Not accept the job
3. Arrange with the Legislature to have the taxpayers pay all judgments and expenses and thus insulate those persons who do act in bad faith as well as victims such as petitioners
4. Take the courts into partnership and seek declaratory judgments in every instance when civil rights may be involved in an executive judgment
5. Avoid making any decision.

With the application of limited immunity properly defined, none of these steps will be necessary.

III.

THERE IS A CONFLICT BETWEEN THE 7TH CIRCUIT IN DONAHUE AND THE 8TH CIRCUIT IN JENSON v. OLSON 8 CIR., 1965, 353 F. 2d 825.

One of the cases cited by petitioners is *Jenson* v. *Olson*, 8 Cir. 1965, 353 F. 2d 825.

The majority opinion in the *Donahue* case states that *Jenson* "no longer represents the prevailing thought in this area. (Pet. App. A8.) The majority opinion then cites *Keyishian* v. *Board of Regents*, 385 U. S. 589, 17 L. Ed. 2d 629, 87 S. Ct. 675 (1967) and *Pickering* v. *Board of Education*, 391, U. S. 563, 20 L. Ed. 811, 88 S. Ct. 1731 (1968) in support of this proposition.

The dissent in *Donahue* states that the *Jenson* decision still "has continuing vitality". (Pet. App. A15) The dissent premises this statement on its assertion that the *Pickering* case stands for the proposition that a public employee may be terminated "if the functions of a public entity are substantially impeded by an employee's statements". (Pet. App. A15)

It is respectfully submitted that there is a conflict between the 8th Circuit and 7th Circuit Courts of Appeal regarding a public entity's right to terminate an employee, serving at the pleasure of the appointing authority, for exercising his freedom of speech.

It is further submitted that the *Pickering* case has not resolved this dispute, as evidenced by the reliance on *Pickering* in both the majority and dissenting opinions, and, because *Pickering* did not deal with a factual situation similar to that in *Donahue*. An analysis of the *Pickering* decision is in order.

Pickering was terminating from his tenured teaching job for writing a letter to a local newspaper criticizing the local

School Board's handling of a bond issue and its allocation of resources between educational and athletic programs. This letter also charged the superintendent of schools with attempting to prevent teachers from opposing or criticizing the bond issue. The *Pickering* court found that there were no fact findings on the effect of the letter on "the community as a whole or on the administration of the school system in particular (391 U. S. at 567).

The majority opinion in *Pickering* also stated at 391 U. S. 569-570:

> "The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among co-workers is presented here. Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning."

In reaching its conclusion that the plaintiff's employment in the *Pickering* case was terminated in violation of his first amendment rights, the court stated that it considered the plaintiff's level of accountability for his statement to be the same as a member of the general public and consistent with *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 ALR 2d 1412 (1964). In summarizing its holding, the majority said:

> "... in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." (391 U. S. at 574)

Thus, *Pickering* stands only for the following:

> If the discharged public employee's employment is only incidentally involved in the subject matter of his

exercise of his first amendment freedom, then the employee cannot be discharged unless the employee knows the statements to be false.

The *Pickering* court did not have before it a plaintiff, like Donahue, who made sensational and false statements (assuming them not to be knowingly false) and whose employment was very much involved with the subject matter of his statements. The U. S. Supreme Court has not yet defined the rights and responsibilities in this area of conduct. The *Pickering* court recognized this when it said at 391 U. S. 569:

> "... Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged."

It is precisely in this uncharted area where the *Donahue* case falls. It follows that there does exist a conflict between the 8th Circuit Court of Appeals (*Jenson*) and the 7th Circuit Court of Appeals (*Donahue*) which is unresolved.

Some of the unanswered questions in this uncharted area are as follows:

1. To what extent must a discharged employee verify his information before speaking?

That *Pickering* did not answer this is stated at 391 U. S. 572:

> "... We are thus not presented with a situation in which a teacher has carelessly made false statements about matters so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter because of the

> teacher's presumed greater access to the real facts. Accordingly, we have no occasion to consider at this time whether under such circumstances a school board could reasonably require that a teacher make substantial efforts to verify the accuracy of his charges before publishing them."

The "presumption" of verification made by the majority in the *Donahue* case (Pet. App. A5) is insufficient and represents another finding of fact by the majority.

2. To what extent, if any, does a public employer's ability or opportunity to refute admittedly false statements by an employee extinguish the employer's justification for discharging the employee?

Does *Pickering* mean that an employee may make unknowingly false statements and retain his job because the agency employing him can refute the false charges?

Surely, the court is not delving into motives. Did the employee deliberately set out to malign his employer? If not, is it up to the employer to set it straight with the public he serves?

What about *Donahue?* His first round of charges provoked a special investigation by the Board of Mental Health Commissioners (App. 74), not to challenge his employment, but to investigate his charges. That body found Donahue's charges exaggerated and unfounded, and declared it would take a year to repair the damage done to patients, relatives of patients, and the staff of the mental hospital. (Supp. App. 47)

Assuming that Donahue was unaware of the falsity of his accusations, are those charged with the responsibility for the mental patients limited to engaging in public debate with their own chaplain as the only means of protecting the patients and their families from a repetition of the terrors, apprehensions, confusion and misunderstanding resulting from Donahue's earlier charges?

That the *Jenson* case continues to have vitality and has not been superseded by *Pickering* is evidenced by the case of *London* v. *Florida Department of Health and Rehabilitative Servives,* 313 F. Supp. 591 (N. D. 1970), aff'd., 5 Cir. 1971, 448 F. 2d 655, cert. denied, which was decided after Pickering.

IV.

THE COURT OF APPEALS MAY NOT ACT AS THE TRIER OF FACTS TO CURE THE FAILURE OF THE DISTRICT COURT TO MAKE FINDINGS OF FACT ON ESSENTIAL ELEMENTS OF PETITIONERS' CAUSE OF ACTION.

This is not a simple dispute between a citizen and an agency of state government carried on in a letter to the editor column. This is not a tenured or untenured teacher whose academic freedom is an essential of his employment.

This is a dispute which had flared up for the second time between a chaplain and the professional staff and administrators of a hospital for the mentally insane. A special commission to investigate the first episode found the charges against the hospital to consist of "exaggerated and, in certain cases, unfounded charges." (Supp. App. 47) The commission also reported. "Estimates are that it will take a year to repair the damage done to patients and their relatives and to restore their pride and that of the employees." (Supp. App. 47)

The respondent acknowledges that the charges in the first episode were the same as the accusations he made which are part of the episode resulting in his termination. (App. 135-136)

The District Court made no finding:

1. whether the respondent's statements were knowingly false or recklessly made, or
2. that the petitioners acted in bad faith.

The majority opinion in the Court of Appeals states:

> "We will assume for the purpose of this opinion that some of the allegations made by the plaintiff were false or misleading. However, upon our examination of the record, *we find* that at the time of their issuance they were reasonably believed to be true by the plaintiff and were not knowingly false and recklessly made." (Pet. App. A6-A7, emphasis added)

The majority opinion predicates its holding that petitioner's right of free speech was violated on the "fact" that the statements were not false statements knowingly or recklessly made by respondent. (Pet. App. A8)

The majority opinion below further states:

> "In this regard, defendants claim that since the court below did not specifically find that they acted in bad faith, they are entitled to immunity from all damages. However, it is a necessary implication of the court's decision and judgment against the defendants that they acted without justification in the case at bar. . . .
>
> "Since we have found that defendants acted in bad faith, . . ." (Pet. App. A12-A13)

The majority thus found bad faith in the absence of any such finding by the District Court by equating a finding that respondent's civil rights were violated with a finding that it was done in bad faith.

The majority acknowledges that petitioners have a qualified immunity, which is dependent on good faith action and that respondent can recover punitive damages only if the petitioners are guilty of bad faith. Consequently, bad faith is an essential element of respondent's cause of action as well as his entitlment to any damages, either compensatory or punitive, against the petitioners.

Federal Courts of Appeal neither inherently or by express or implied grant have the power to make findings of

fact. *Randall Foundations, Inc.* v. *Riddell,* 9 Cir. 1957, 244 F. 2d 803, 805; *Waialua Agriculture Co.* v. *Maneja,* 9 Cir. 1954, 216 F. 2d 466; *Hubshman* v. *Louis Keer Shoe Co.,* 7 Cir. 1942, 129 F. 2d 137, 142; *Hycon Manufacturing Company* v. *H. Koch & Sons,* 5 Cir. 1955, 219 F. 2d 353, 355; and *Smallfield* v. *Home Insurance Company of New York,* 9 Cir. 1957, 244 F. 2d 337, 341 and *Hill York Corp.* v. *American International Franchises, Inc.,* 5 Cir. 1971, 448 F. 2d 680, 691.

In *Waialua Agriculture Co.* v. *Maneja,* the court said:

> We are forbidden by statute, custom and rule from making new findings of fact, even where we believe these are demanded by the record. This prohibition does not vanish where, as here, comprehensive agreements of fact are made in writing and much of the proof is documentary while the testimony does not bear on the contested issues. . . . (216 F. 2d at 474)

Interestingly, in the earlier case of *Hubshman* v. *Louis Keer Shoe Co.,* the Seventh Circuit (which made findings of fact in the present case) said:

> . . . The failure of the trial court to find a fact essential to the defendant's recovery cannot be supplied by us, even if we thought the evidence of the record warranted it. Findings of fact are like a special verdict, and all the facts essential to entitle a party to judgment must be found; and a judgment rendered on a special finding that fails to find all essential facts is erroneous. . . . (129 F. 2d at 142)

The historic development of the rule against fact finding by courts of review in the federal system was noted in *Hycon Manufacturing Company* v. *H. Koch & Sons*:

> It is then said the proof was documentary and was all before the trial court. If this were conceded, there were still questions of fact to be resolved which an appellate court is not permitted to adjudicate. Trial de novo, which was formerly the rule in admiralty,

> ecclesiastical courts and in some chancery cases, is definitely abolished in civil cases in the federal courts by the rules constricting review. No authority is given except to District Courts to make new findings of fact. Presently our sole function as to such findings is to re-examine judicially, criticize and set aside if "clearly erroneous". The existence of the basis of fact in documentary form or in agreed statement of the parties does not transmute such propositions into questions of law. (219 F. 2d at 355)

The determination of whether respondent knowingly or recklessly made false statements and whether petitioners acted in bad faith is the proper function of the District Court. As noted in the dissent of Justice White in *Pickering* v. *Board of Education*, 391 U. S. 563, 584; 20 L. Ed. 811, 826-827; 88 S. Ct. 1731 (1968):

> Nor can I join the Court in its findings with regard to whether Pickering knowingly or recklessly published false statements. Neither the State in presenting its evidence nor the state tribunals in arriving at their findings and conclusions of law addressed themselves to the elements of the new standard which the Court holds the First Amendment to require in the circumstances of this case. Indeed, the state courts expressly rejected the applicability of both New York Times and Garrison. I find it wholly unsatisfactory for this Court to make the initial determination of knowing or reckless falsehood from the cold record now before us. It would be far more appropriate to remand this case to the state courts for further proceedings in light of the constitutional standard which the Court deems applicable to this case, once the relevant facts have been ascertained in appropriate proceedings.

If the Courts of Appeal choose to make findings of fact, then a litigant may never have a review of those findings on appeal unless this court grants a petition for certiorari.

CONCLUSION.

It is respectfully requested that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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and
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APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

SEPTEMBER TERM, 1971 — JANUARY SESSION, 1972

No. 71-1160

JOSEPH L. DONAHUE,
Plaintiff-Appellee,

vs.

PATRICK STAUNTON, INDIVIDUALLY AND AS CHICAGO AREA ZONE DIRECTOR, H. C. PIEPENBRINK, INDIVIDUALLY AND AS MANTENO STATE HOSPITAL SUPERINTENDENT, JOHN F. BRIGGS, INDIVIDUALLY AND AS DIRECTOR OF THE ILLINOIS STATE DEPARTMENT OF MENTAL HEALTH,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 70-C-146

RICHARD B. AUSTIN,
Judge.

Argued January 24, 1972—Decided July 6, 1972

Before SWYGERT, *Chief Judge,* HASTINGS, *Senior Circuit Judge,* and SPRECHER, *Circuit Judge.*

HASTINGS, *Senior Circuit Judge.* Joseph L. Donahue brought this action against the defendants Patrick Staunton, individually and as Chicago Area Zone Director of the Illinois Department of Mental Health; H. C. Piepenbrink, individually and as Manteno State Hospital Superintend-

ent; and John F. Briggs, individually and as Director of the Illinois State Department of Mental Health, alleging that defendants had discharged plaintiff from his position as Chaplain at the Manteno State Hospital in abrogation of his right to freedom of speech guaranteed by the First and Fourteenth Amendments to the Federal Constitution. He sought relief pursuant to Title 42, U. S. C. A. § 1983. Jurisdiction was established pursuant to Title 28, U. S. C. A. § 1343.

This case was tried to the court without a jury. The court filed its findings of fact and entered conclusions of law favorable to plaintiff and rendered judgment against the defendants in the amount of $2,000 as punitive damages, with interest; out-of-pocket expenses in an amount to be later determined; attorney fees of $750; and costs. Affirmatively, defendants were ordered to offer plaintiff full and unconditional reinstatement to his former position and, in the event he accepted such reinstatement, an injunction would be issued restraining and enjoining defendants, their agents and successors, from interfering with, coercing or discriminating against plaintiff in the exercise of his protected rights of free speech. Defendants have appealed.

Plaintiff Father Donahue, a Roman Catholic Priest, was appointed Catholic Chaplain at Manteno State Hospital on July 14, 1964, and served in such capacity until his discharge on December 4, 1969. As Chaplain, plaintiff received a salary which he, under his vow of poverty, forwarded to the Order of St. Viator, withholding sufficient funds to provide for his daily needs. In this capacity plaintiff was charged with serving the spiritual needs of the patients and employees at Manteno, along with sundry other duties, including speaking at public functions to explain the operations of the hospital.

Along with all other employees of the hospital, plaintiff was annually rated in the performance of his duties. Until

the final report, prepared after plaintiff's discharge, he was always rated either "good" or "excellent" on seven separate categories of duties and responsibilities. The annual review covering the period from July 14, 1968 to July 14, 1969 (five months prior to his discharge), prepared by plaintiff's immediate superior, contains the following analysis of his performance:

> "Father Donahue energetically and conscientiously discharges his duties as a spiritual advisor and counselor to the patients of Catholic faith at M. S. H. He has extremely favorable rapport with the patients to whom he provides the chaplaincy services, and at all times considers what is best for the patient.
>
> • • • • •
>
> "Father Donahue constantly strives to bring about better conditions at M. S. H. and in doing so apprises the staff of changes that should be initiated in order to correct situations which are not acceptable for the care and treatment of the mentally ill. His ability to communicate with others concerning these problems and the presentation of his solutions leave little to misinterpretation. His strong initiative and precise communicating among employees and patients are attributes which make him an asset to M. S. H."

Soon after plaintiff was assigned to Manteno, the hospital entered a period of transition. New policies were instituted so that the patients were no longer kept locked up and under strict security, no longer were the sexes separated, and the hospital's employment practices were decentralized. Plaintiff approved of these enlightened and progressive policies in theory but became alarmed with the method of their implementation. It was the consensus that such new programs would require more supervision than formerly provided. He was gravely concerned that the supervision was inadequate.

In 1966 plaintiff expressed his criticism and concern in a union newspaper column which he authored; in a

public speech to a convention of the Illinois State Federation of Labor; and in other avenues of public expression.[1] Following the Board's report, *supra* note 1, defendant Piepenbrink in 1967 appointed plaintiff to a committee with the responsibility of developing a hospital policy relating to the problems of promiscuity.

It appears from the record that there was a lull in the plaintiff's public criticism of the hospital operations. Later, frustrated by what he felt was a lack of progress in resolving the problems of the hospital, plaintiff in the fall of 1969 began another campaign of public criticism. His public statements included a speech by him critical of the operations of the hospital, which was reported in a local newspaper on October 20, 1969; on October 27, 1969, the same newspaper printed a letter to the editor written by

---

1. On September 9, 1966, the Governor of Illinois called for an investigation by the Board of Mental Health Commissioners into the public criticism of the Manteno State Hospital. The main impetus for this investigation seems to have come from picketing by off-duty hospital employees who publicly expressed concern over the moral climate at the hospital.

The Board issued a report to the Governor on October 20, 1966, and found that sexual behavior of all types would undoubtedly be less if there was a more adequate staff to supervise the patients under the more permissive policies. However, the Board felt that sexual morality was not the basic issue but rather that Manteno was in transition and operating a gigantic institution on a skimpy budget which was designed before most of the new programs began.

This report in many respects is consistent with the concerns expressed by plaintiff in his public statements, although the report was critical of public criticism itself. In the newspaper report of plaintiff's public speech it was stated:

> "The new programs introduced by the Illinois Department of Mental Health are fine but it's like buying an expensive car when you can only afford a wheel-barrow. The programs need workers and the patients need constant examination, weeks and weeks of intensive treatment and constant care.
>
> "But he added, because there are insufficient employes and because 'many employes are unqualified' to carry out such programs, the result has been unsupervised wards, inadequate care, and illicit sexual activity."

plaintiff in which he criticized as impractical a particular program of the hospital; and on November 13, 1969, the same newspaper published a paid advertisement authored by plaintiff and one Thomas Nayder which set forth 12 specific incidents of negligence or improper activity at the hospital.

The advertisement appears to be the most critical statement made by the plaintiff and one of the significant factors leading to his discharge. In relevant part, the advertisement charged that the Director of the Illinois Mental Health Department, the Superintendent of Manteno State Hospital and the directors of certain programs at the hospital were all "laymen," and that there was neglect in the preparation and funerals of the dead, little or no effort on the part of authorities to prevent runaways and improper treatment and delay in treatment of patients. He questioned the legality of a self-medication program and asserted that the hospital lacked certain facilities. He charged there was mixing of untidy patients with tidy patients, that the hospital issued birth control pills to highly promiscuous patients and other incidents of neglect.

Although the truth or falsity of these allegations was not proven at trial, we note that many of the accusations came from reports of the "Pharmacy & Therapeutics Committee Meetings" at Manteno State Hospital and other inter-office memoranda. Also, plaintiff testified, and we presume from the court's findings that it was credited, that he checked every charge he made either by direct observation, conversation with "reliable sources, doctors, nurses, security men and aides," or through a number of memoranda which came to his office. He also testified that he never knowingly published or stated anything that was false.

Letters were also written by plaintiff to the Governor in which he stated his purpose was "to relate some of

[the] happenings" at the hospital. Copies of such letters were sent to defendant Briggs. In addition, plaintiff encouraged others to write to the Governor to protest what he believed to be the deplorable conditions at Manteno.

Defendants assert that the plaintiff's statements were made without checking their validity and contained falsehoods and half-truths which were detrimental to the operation of the hospital and the well-being of the patients. The termination slip handed to plaintiff stated he was discharged for cause, to wit:

> "In the best interest of the patients and staff at Manteno Hospital, the Chicago Area Zone Director, Patrick Staunton, M. D., and Manteno State Hospital Superintendent H. C. Piepenbrink, have decided on this action. This priest has consistently, and without checking validity of criticism, made public charges against the treatment programs of this facility which have little basis in fact and which are detrimental to the care and treatment of the patients and can no longer be tolerated by the management of one of its employees."[2]

Hence the principal issue we face here is whether the discharge of plaintiff by the named defendants violated his First Amendment right to freedom of speech. Ancillary issues are: whether plaintiff was an employee of the Manteno State Hospital; whether the Illinois statutory scheme for the discharge of employees was improperly held unconstitutional; and whether the remedy afforded was proper.

We will assume for the purposes of this opinion that some of the allegations made by the plaintiff were false

2. There is credible evidence, in the form of a memorandum from John P. Dailey, Special Assistant to the Governor, to defendant Briggs approving his decision to discharge plaintiff and cautioning him to do it properly because of the inevitable protest from certain sectors, to support the court's conclusion that defendant Briggs was also a party to the discharge of plaintiff.

or misleading. However, upon our examination of the record, we find that at the time of their issuance they were reasonably believed to be true by the plaintiff and were not knowingly false and recklessly made.

Defendants' first claim, that plaintiff was not an employee of the State of Illinois or Manteno State Hospital, is without substance. It almost goes without saying that plaintiff was an employee of the State, *i.e.*, he received a salary from the State, it being irrelevant that he saw fit to forward the money to his Order; his performance as Chaplain was evaluated annually by his superior, as was the performance of all other hospital employees; and his termination slip spoke of him as an employee. We hold there was sufficient indicia of an employment relationship to support this cause of action.

Since we find that plaintiff was an employee of the State, we need not decide the further question of whether any relationship between an individual and the State other than employment, which, if terminated in violation of constitutional rights, would be sufficient for a cause of action under section 1983.

Defendants next contend that the "Personnel Code" of Illinois, established pursuant to ch. 127, § 63b 101, et seq., of Illinois Rev. Stat. (1969), was implicitly held unconstitutional by the trial court and thus the use thereof was enjoined. This they argue violated Title 28, U. S. C. A. § 2281, which provides that any injunction restraining the enforcement or use of a state law by a federal court must be by a district court of three judges.

It is conceded that plaintiff's position with the hospital was "exempt" under the Illinois "Personnel Code," *supra*, and that he could be discharged at his employer's discretion without a civil service hearing.

We hold that the court below did not find the Illinois statutory scheme violative of the First and Fourteenth

Amendments, but rather held that the discretion afforded employers by the statute was necessarily limited by the requirements of the federal constitution; hence, by implication the state statute was held constitutional. The defendants, not the statute, were held to have deprived plaintiff of his constitutional rights. The conditional injunction was directed against the defendants, state agents, and not the use of the state statute.[3] It necessarily follows that we find nothing improper in the district court's procedural disposition of this case.

We finally come to the crucial issue, *viz.*, whether the defendants by discharging plaintiff deprived him of his First and Fourteenth Amendments rights to freedom of speech.

Defendants would have us rely on the analysis in *Jenson* v. *Olson*, 8 Cir., 353 F. 2d 825 (1965), in deciding this question. We find *Jenson* to be unpersuasive, mainly because it no longer represents the prevailing thought in this area. *See Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967) and *Pickering* v. *Board of Education*, 391 U. S. 563 (1968).

The leading Supreme Court case involving constitutional rights of public employees is *Pickering* v. *Board of Education*, 391 U. S. 563 (1968). Under the particular facts in that case, the Court applying the *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), standard for defamation against public officials, held: "In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." 391 U. S., at 574.

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3. The district court specifically stated: "I have no quarrel with your [defendants'] right to discharge noncivil service employees peremptorily providing that their federal civil rights and constitutional rights have not been violated. I have no quarrel with that being the law."

Pickering was a refinement of the idea that public employment may not be conditioned upon the surrender of constitutional rights. As was stated by the Court in *Keyishian* v. *Board of Regents*, 385 U. S. 589, at 605-6 (1967), "'* * * the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.'" Taking this lead, we announced in *Muller* v. *Conlisk*, 7 Cir., 429 F. 2d 901, at 904 (1970): "It may no longer be seriously asserted that public employees, including policemen, have no right to criticize their employer."

The reason for the rule announced in *Pickering* was explained in *Kiiskila* v. *Nichols*, 7 Cir., 433 F. 2d 745, at 749 (1970). "A citizen's right to engage in protected expression or debate is substantially unaffected by the fact that he is also an employee of the government and, as a general rule, he cannot be deprived of his employment merely because he exercises those rights. This is so because dismissal from government employment, like criminal sanctions or damages, may inhibit the propensity of a citizen to exercise his right to freedom of speech and association." The court elaborated: "To protect society's interest in uninhibited and robust debate the first amendment demands that government be prohibited from inhibiting or suppressing speech by indirection through discharge of a government employee when the same objective could not constitutionally be achieved by criminal sanctions or other direct means." *Id.*

This is not to say that a public employer or State may under no circumstances discharge an employee for his public statements. *Pickering* provided, at 569: "Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we

do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged." Rather the Court felt: "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568.

Interests of the State which, if strong enough, the Court in *Pickering* felt might lead to a different result in the future are: (1) maintaining discipline or harmony among co-workers; (2) need for confidentiality; (3) employee's position may be such that his false accusations may be hard to counter because of the employee's presumed greater access to the real facts; (4) statements which impede the employee's proper performance of his daily duties; (5) statements so without foundation as to call into question his competency to perform the job; and (6) a close and personal working relationship between the employee and supervisor which called for personal loyalty and confidence.

Defendants argue that plaintiff's accusations were so extensive and so critical that they impeded the performance of his duties, namely, to address "professional and lay groups to promote understanding of problems and obligations concerning patients" and "interpret the institution's problems and policies to the public." However we do not find that this was such a critical responsibility of a Chaplain as to give the State a strong enough interest to interfere with the plaintiff's free speech rights. This is especially so since plaintiff was not even evaluated on this function until May 13, 1969, and then he was rated "good." Further, defendants were not able to prove that the plaintiff's vociferousness hindered him in the performance of his religious and spiritual duties toward the patients at Manteno.

It could be argued that plaintiff's exaggerated comments, because he is a priest, were given greater credence by the general public than would those of a non-clerical employee. This may be true, but defendants have not shown that they were hindered in any way in responding to the accusations of plaintiff; in fact, at several points they specifically chose not to respond. Also, if plaintiff's criticisms were so clearly false, as defendants would have us believe, we do not see how his being refuted by open and free public debate and discussion. Indeed, that is what freedom of speech is all about.

In sum, we have considered the countervailing factors mentioned in *Pickering* and find them inapplicable here. We conclude and hold in the case at bar that the interest of society in "uninhibited and robust debate" on matters of public concern, such as mental health care, and plaintiff's individual interest in being free to speak out on matters of concern to him, outweigh those of the State as an employer. This is a proper guarantee of "the public's right to know." It follows that the actions of defendants, as agents of the State, in dismissing plaintiff, violated his First and Fourteenth Amendments rights to free speech.

Having found that defendants violated plaintiff's constitutional rights, our next concern is whether the relief afforded in the judgment below was proper. Defendants first argue that because the district court found that they "were acting within their authority and capacity as officials and agents of the State of Illinois," they were entitled to an immunity from any and all damages resulting from their actions.

In *McLaughlin* v. *Tilendis*, 7 Cir., 398 F. 2d 287 (1968), where the defendant had claimed protection from damages in a section 1983 action under the Illinois Tort Immunity Act (Ill. Rev. Stats. 1967, ch. 85, § 2-201), we held: "Under the Supremacy Clause, that statute cannot protect defend-

ants against a cause of action grounded, as here, on a federal statute. * * * However, other officials [than legislators and judges], such as present defendants, retain only a qualified immunity, dependent on good faith action." *Id.* at 290.

In this regard, defendants claim that since the court below did not specifically find that they acted in bad faith, they are entitled to immunity from all damages. However, it is a necessary implication of the court's decision and judgment against the defendants that they acted without justification in the case at bar. "At best, defendants' qualified immunity in this case means that they can prevail only if they show that plaintiffs were discharged on justifiable grounds. Thus, here a successful defense on the merits merges with a successful defense under the qualified immunity doctrine." *McLaughlin* at 290-1.[4]

Defendants claim that the damage award of $2,750 ($2,000 punitive damages and $750 attorney fees) was improper because it was against defendants *and/or their successors.* This is inaccurate and ignores the fact that the district court by order of January 7, 1971, deleted the words "and/or their successors" from the monetary award for punitive damages and attorney fees. However, we find that the award of out-of-pocket expenses inadvertently still includes the words "and/or their successors." Since defendants' successors were not parties to this lawsuit, the judgment to that extent must be and is ordered modified by deleting the words "and/or their successors" from the award of out-of-pocket expenses.

Defendants question the award of *punitive* damages. Their concern is without foundation. Since we have found

4. *See also Simcox* v. *Board of Ed. of Lockport Tp., Will Co., Ill.*, 7 Cir., 443 F. 2d 40, at 42 (1971), where we reiterated the established rule: "Any immunity which public officials enjoy in dealing with their employees is limited by the requirement that their actions *vis-a-vis* such employees be taken in good faith."

that defendants acted in bad faith, the award of punitive damages was within the sound discretion of the trial court.

Although the defendants have not raised the question, we feel that, in the interest of justice, we should inquire into the propriety of awarding attorney fees in this case. Section 1983 does not by its terms expressly authorize or deny the allowance of attorney fees. "There is ample authority * * * to support the proposition that the allowance of attorneys' fees and expenses of preparation for trial is in the discretion of the district court *sitting in equity* where exceptional circumstances call for their allowance in order to do justice between the parties * * *." *Lee* v. *Southern Home Sites Corporation,* 5 Cir., 429 F. 2d 290, at 295 (1970).

In *Lee,* where the trial court had denied attorney fees, the court found, at 296: "Clearly, for this court to overturn a denial of attorneys' fees, it must appear that the trial court abused its discretion, but it is impossible to review the soundness of such an exercise of discretion unless the trial court indicates in its findings of fact the grounds upon which it exercised its discretion * * *." Similarly, in the case at bar, there are no grounds given for the award of attorney fees by which we can judge the soundness of the exercise of the trial court's discretion.

Nevertheless, we need not remand for further findings in this case because the reasons for the award of attorney fees appear from the face of the record. The benefit to the general public, *i.e.,* of encouraging free and robust public discussion, is substantial in this case and should not depend for its protection upon the financial status of the individual who is deprived of his constitutional rights. Hence, the relative financial positions of the parties at the time of the constitutional violation, which in the case at bar weighs in favor of allowing attorney fees,[5] is relevant. There is also some

5. Although there is some indication in the record that plaintiff is on leave from his Order as a priest and is working for compensation with a labor organization, this is irrelevant since the critical time is the time of the constitutional deprivation.

evidence that the result of plaintiff's dismissal had a chilling effect upon public discussion of mental health care by employees at Manteno. And finally, although defendants' actions were not found to be egregious, they were consciously taken to stifle plaintiff's public criticism. Although we consider the better practice to be for a trial judge to state his grounds for an award of attorney fees, we hold the evidence weighs in favor of an award here and in doing so that the district court did not abuse its discretion.

We have reviewed all other objections to the relief afforded in this case and find them unpersuasive. If more should be said, we need only to quote from the oft-cited case of *Bell* v. *Hood,* 327 U. S. 678, at 684 (1946): "Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."

For the foregoing reasons, the judgment is affirmed as modified.

AFFIRMED AS MODIFIED.

SWYGERT, *Chief Judge,* dissenting.

Despite the defendants' arguments, I agree with the court that the plaintiff's connection with the Manteno State Hospital was tantamount to an employment relationship. Thus, as indicated by Judge Hastings, the crucial question is whether the plaintiff's constitutional right of freedom of speech was infringed by reason of his termination as chaplain of the hospital. In my judgment the circumstances leading to plaintiff's discharge legally justified that action and therefore it was error to afford relief under 42 U. S. C. § 1983.

The premise that public employment may be conditioned upon a surrender of constitutional rights was flatly rejected in *Keyishian* v. *Board of Regents*, 385 U. S. 589, 605-06 (1966); however, the first amendment rights of public employees are not absolute and must yield to accommodation when overriding interests of public policy are at stake. *United Public Workers* v. *Mitchell*, 330 U. S. 75, 95 (1946). The court concedes as much when it acknowledges that there can be circumstances when a public employee may be discharged for his utterances.

Pickering v. *Board of Education*, 391 U. S. 563 (1968), does not wipe out all curtailment of a public employee's right to speak. "[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." 391 U. S. at 568. The Court went on to explain that a balance of competing interests must be struck. "The problem in any case is to arrive at a balance between the interests of the . . . [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568.

I read *Pickering* to hold that if the functions of a public entity are substantially impeded by an employee's statements relating to those functions, measures may be taken to regulate such speech even to the point of terminating employment. If that reading is correct, then the following view expressed by the Eighth Circuit in *Jenson* v. *Olson*, 353 F. 2d 825 (8th Cir. 1965), even though predating *Pickering*, has continuing vitality: "When his . . . [the employee's] speech is disruptive of the proper functioning of the public's business the privilege of governmental employment may be withdrawn without it being said that he was denied his freedom of speech. To hold otherwise would

enable governmental employees to practice the rankest form of insubordination and safely hide behind the right of free speech."

As shown by the majority opinion the plaintiff initially began criticizing the hospital's operation in 1966. Because of plaintiff's and others criticism, the then Governor of the State of Illinois requested the Board of Mental Health Commissioners to investigate charges of immorality at the Manteno State Hospital. Five Illinois citizens, including two members of the Chicago Bar, composed the Board. After conducting several days of hearings and interviewing nearly thirty witnesses, the Board issued a lengthy report which included a number of findings and a variety of recommendations.

The report pointed out that the hospital housed over six thousand patients and had in excess of eighteen hundred employees. The Board then referred to the fact that, in line with modern mental health concepts, the old custodial approach "which resulted in the bitterly criticized warehousing of our mentally ill" was being replaced by newer methods so as to permit the institution to be administered as an "open institution." It was acknowledged that this change had generated a number of administrative problems. The Board then addressed itself to the specific accusation of immorality within the institution. The substance of the report is that the hospital had been doing all it could do to curb "acting-out" sexual behavior among the patients, given the fact that there was a lack of adequate security and supervisory personnel. The Board specifically found the charge untrue that birth control pills were being purchased and indiscriminately dispensed. It concluded that sexual immorality was not the basic problem and that many of the other problems besetting the hospital were due to the changes then in progress as well as a "skimpy" budget and a "burgeoning" admission load. Among other recom-

mendations, the Board urged that the "open door" policy continue.

In the course of its discussion, the Board stressed the fact that the promulgation of exaggerated and in some instances unfounded accusations were harmful to patients and their families and discouraged administrators "who are trying their best to bring about changes against considerable odds." Regarding these accusations, the Board observed, "Estimates are that it will take a year to repair the damage done to the patients and their relatives, and to restore their pride and that of the employees." The Board added, "These remarks are not a plea to stifle criticism—in a community of 8,000 people related to a giant mental health institution as patient, employee or executive, there will always be a broad range of matters to criticize. . . . It is always a satisfying demonstration of public conscience when there is discussion and concern about programs. But this is only true when responsible and valid criticism with supporting facts is so directed in such a way as to be constructive and to preserve the goals of the institution."

The Board's report was issued in October 1966. Following its issuance, the plaintiff ceased criticizing the hospital for approximately three years; however, in the latter part of 1969 he resumed his attacks. As the majority opinion indicates, these attacks took the form of a speech reported in the *Kankakee Daily Journal*, a letter to the editor printed in the same newspaper, an appearance on a television program, and an advertisement prepared and paid for by the plaintiff which appeared in the *Journal*.

Most of the accusations leveled at the hospital's administration were nothing short of sensational. The newspaper account of his speech reported the plaintiff as having said that "homicidals, suicidals, arsonists and molesters were being released into the streets of Kankakee, Bradley,

Manteno" and other communities; also that because of unqualified employees there were "unsupervised wards, inadequate care, and illicit sexual activity." During the television program the plaintiff charged that many of the patients had died of dehydration because they could not get to a drinking fountain. The most scathing criticism was contained in the advertisement which the plaintiff authorized.[1]

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1. The advertisement appearing in the *Kankakee Daily Journal* reads in part:

SOME FACTS TO HELP YOU FORM A JUDGMENT:

1. The piling of bodies (male upon females) upon one another in the Morgue Vaults.
2. Neglect of Morgue refrigeration, causing decay of bodies before Burial:
   Recently a couple travelled over 60 miles to attend Morgue Funeral of a relative, were unable to view deceased. Undertaker was unable to properly embalm the decomposed body.
3. Little, or no effort on part of authorities to prevent runaways: Some runaways have died in nearby fields, where their bodies were torn apart and eaten by the birds and animals of the fields. (It would be humane if they were dead before the beasts came upon them.)
4. One Patient complained she was ill. Suddenly she was violently ill and moved to the Acute Hospital where she died one hour later. Perforated ulcerated colon, peritonitis had set in. Proper examination of patient in the Acute Hospital on first complaint may have saved her life. Mother of this patient not notified of the girl's illness. She became very disturbed and upset when notified of her daughter's death.
5. January 1969 a Patient was found to have a Cancer of the Nasal cavity. In March 1969 a biopsy was performed. The Patient was ordered to be sent to the Illinois Eye and Ear Infirmary, Chicago, a transfer that was not made until late August, 1969. Why the delay? The Doctor at the Infirmary complained of the terrible manner that Manteno State Hospital neglected its patients. (Great loss of weight, difficulty in swallowing, dehydration, and so weak he could not stand.)
6. Self Medication program, where Patients are given the responsibility to take their own medication. No Nurses or

Shortly after the appearance of the advertisement the hospital terminated the plaintiff's employment. The termination notice contained the reason given by the hospital for its action: "For cause, to wit: In the best interest of the patients and staff at Manteno State Hospital, the Chicago Area Zone Director, Patrick Staunton, M.D., and Manteno State Hospital Superintendent, H. C. Piepenbrink, have decided on this action. This priest has consistently, and without checking validity of criticism, made public charges against the treatment programs of this facility which have little basis in fact and which are detrimental to the care and treatment of the patients and can no longer be tolerated by the management of one of its em-

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certified Aides on the program. (The legality of such a program is questionable.)

7. A Patient struck in face by another patient bled profusely. Unable to stop flow because Manteno State Hospital lacked the facilities. Time was a factor. Patient was moved to a Hospital 50 miles away where he died. In such an emergency the question is "why the facilities of the local Hospitals were not used?"
8. Many patients are untidy because of organic reasons. Frequently they are placed on Wards with tidy patients. Some Physicians believe these organic conditions are most infectious. Visitors (of all ages) to these Wards are often exposed to Male and Female patients sitting around naked slopping in their feces.
9. Birth control Pills issued, as admitted by member of the Hospital pharmacy committee, only to prevent pregnancies of highly promiscuous patients.
10. Aides on Wards where young male and female patients reside complained to the Authorities "male patients abuse the female ones." "Wards are not safe for patients or employees." What must we do when female patients ask help because male patients bother them? The Doctor replied: "Tell the men to leave the women alone."
11. A known hostile, aggressive and frequent runaway patient has twice in four months stole sets of Hospital keys and car keys from careless employees and stole two automobiles.
12. Some Mittimus cases have privilege of the Hospital grounds. One was permitted a Home Visit. (ILLEGAL?)

ployees." This reason, namely, that plaintiff's accusations had a detrimental effect on the hospital's programs for the treatment and care of its patients is corroborated by two contemporaneous documents: one, a report made by the head of the Mental Health Department,[2] the other, a memorandum signed by the director of the hospital's Administrative Services.[3]

Although the state has the burden of demonstrating that its governmental functions have been impaired by the public utterances of an employee, that burden was met in this case. It is not difficult to envision the harmful and disruptive effect that plaintiff's accusations had on the patients and their families, the hospital employees and the operation of the hospital generally. His earlier criticism in 1966, the resulting investigation, and the report of the Board of Commissioners must be considered in assessing the position taken by the hospital in 1969. The belief entertained by the institution's authorities that the health and well-being of the patients had been endangered was reasonable under the circumstances. Significantly, the plaintiff offered no evidence to refute the conclusions stated in the termination notice.

Moreover, the hospital's conclusion that the plaintiff had been irresponsible in voicing his criticisms is substantiated by the plaintiff's testimony at trial. The heading of the advertisement contained the statement, "Missing; Psychiatrists and Licensed Physicians, who should know what is best for Mentally Ill." On cross-examination the plaintiff admitted that there "may have been a few" psychiatrists and licensed physicians at the hospital. In reference to his charge that many patients had died of dehydration because they were unable to get to a drinking fountain, the plaintiff admitted that during his employ-

2. See Appendix I of this dissent.

3. See Appendix II of this dissent.

ment he received hospital records in regard to "various deaths and so-called causes," and that none of the reports indicated that dehydration had been caused in the manner he had stated during the television broadcast. As a further indication of plaintiff's irresponsibility in making his accusations, a *Kankakee Daily Journal* reporter accompanied the plaintiff prior to his dismissal on an inspection tour of wards at Manteno. The newspaper later carried a story that its reporter could find no evidence of the conditions the plaintiff had described.

The task of balancing the conflicting interests outlined in *Pickering* v. *Board of Education* is admittedly a difficult one. It requires a careful examination of every facet of the situation in question lest a vital constitutional right be inadequately protected. Such an examination of the facts in this case persuades me that the disruptive effects of plaintiff's actions on the proper functioning of the Manteno State Hospital which lead to his dismissal were substantial and that the interests of the state outweighed the right of the plaintiff to speak as he did. I would hold that defendants had justifiable reasons for terminating the plaintiff's employment and that there was no violation of a constitutional right.

APPENDIX I TO OPINION OF SWYGERT, C.J., DISSENTING

Manteno State Hospital

Department of Mental Health

REPORT OF SEPARATION

Name of Employee Joseph Donahue in the Program Support-Chaplaincy (Department or Program)

Nature of the Departure Termination (Resignation, Leave of Absence, Transfer, Termination, Discharge, Prob. Discharge, Susp.)

Character of Service Poor (Excellent, Good, Fair, Poor)

Final Date Employee Worked December 2, 1969

Final Date Employee is to be Paid Entitled to 3 vacation and 22 accumulated days as of December 16, 1969

/s/ E. C. Simmons,
(Signature of Department Head)

CPH

(Timekeepers Name)

14. Since the last rating, Father Donahue assumed an opposite position of that of the Department, and in so doing, endeavored to force his opinions and views above that of the Department and after repeated consultations with his Supervisor, the Superintendent and Zone Director, he was unable to support the Department; as a result he was terminated. He was unable to accept the policies established by the Department of Mental Health, and the end result was that he could not interpret them but instead rebutted them, which made him incompitable as a loyal employee of the Department of Mental Health. The position that he assumed in relationship to that of the Department consumed a great deal of his time and as a result, he was unable to complete the work and duties which normally are functions of the Catholic Chaplain. His opposition was so strong that he had difficulty in cooperating with other faiths, even to the extent of being able to maintain rapport between himself and his assistant.

18. Father Donahue's initiative in carrying out the duties of the Catholic Chaplains' Office and his dependability in working with the Hospital and its Programs were in exact opposition. Little support, if any, was granted by him, but an undue amount of criticism and opposition were used in an attempt to defeat the policies which were believed to be in the best interests of the residents. His judgment in relation to the Programs at the Hospital and the position which he occupied, left a great deal to be desired and his ability to communicate instructions almost became nonexistent. His inability to work with and cooperate with his assistant were indicative of his inability to adequately supervise and develop his subordinates.

APPENDIX II TO OPINION OF SWYGERT, C. J., DISSENTING

11-3-69 cc: Dr. Staunton

Manteno State Hospital

MEMO

Date November 3, 1969

In Re: _____

To Mr. Piepenbrink, Superintendent

From Mr. Wagner—Geriatric Program

Discussions with several Geriatric Program employees have made me aware that some individuals in the community who might consider employment at the hospital are hesitating to do so due to Father Donohue's recent "alarming" statements. At a time when the labor market is tight and finding suitable replacements is extremely difficult, it is indeed confusing that Father Donohue would undertake a vilification of the Hospital on matters that have already been proven to be either exaggerations or falsehoods. Cannot someone assist Father Donohue in redefining his complaints so that they can be stated more constructively! Alarming potential employees will not assist the hospital in meeting current challenges and providing the best possible care to our patients.

RAW:mbp

cc: Mr. Steinmetz
Mr. Simmons

Signature /s/ Robert A. Wagner,
Robert A. Wagner,
Director Administrative Services.

IN THE UNITED STATES DISTRICT COURT
• • (Caption—70-C-146) • •

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having been tried upon the facts before the Court without a jury, the Court having heard the evidence, does hereby find the facts and states separately its conclusions of law, as follows:

Findings of Fact

1. That this action arises under the First and Fourteenth Amendments to the Constitution of the United States, Title 28 U. S. C. Section 1343 and Title 42 U. S. C. Section 1983.
2. That the plaintiff, Joseph L. Donahue, a citizen of the United States, was employed as a Catholic Chaplain at the Manteno State Hospital, Manteno, Illinois, until December 4, 1969.
3. That the Manteno State Hospital, Manteno, Illinois, is, and has been at all times material herein, a mental hospital and institution controlled and operated by the State of Illinois, through its agents, pursuant to the provisions of Illinois Statutes.
4. That the named defendants did, at all times material herein, occupy the positions set forth opposite their respective names and were agents and officials of the State of Illinois, Department of Mental Health, acting within and pursuant to their authority:

John F. Briggs—Director of the Illinois State Department of Mental Health

Patrick Staunton—Chicago Area Zone Director

H. C. Piepenbrink—Superintendent, Manteno State Hospital.

5. That prior to December 4, 1969, undesirable conditions did exist at the Manteno State Hospital.

6. That these undesirable conditions properly distressed Joseph L. Donahue, the plaintiff, who, in the Fall of 1969, endeavored to call these conditions to the attention of the Chief Executive of the State of Illinois by letter on two occasions, and that such endeavor by the plaintiff was and is a proper method of resolving or attempting to resolve such undesirable conditions.

7. That the plaintiff, Joseph L. Donahue, during the Fall of 1969, engaged in public discussions relating to the existing conditions; that such conduct is similar and identical to the pressure other groups put on mayors, governors and legislative bodies; and that such conduct is proper and within the rights guaranteed under and protected by the First and Fourteenth Amendments to the United States Constitution.

8. That, as a result of the plaintiff speaking forth, said plaintiff was discharged from his employment at Manteno State Hospital on December 4, 1969, by the three named defendants, who were acting within their authority and capacity as officials and agents of the State of Illinois.

9. That the said discharge of December 4 violated the rights of the plaintiff, Joseph L. Donahue, under the First and Fourteenth Amendments to the Constitution of the United States and the provisions of Title 42 U. S. C. Section 1983.

10. That as a direct consequence of said discharge the plaintiff, Joseph L. Donahue, did suffer actual out-of-pocket expenses in an amount to be determined upon stipulation of the parties, or, absent said stipulation, by further order of this Court.

11. That the plaintiff, Joseph L. Donahue, has been unlawfully denied and deprived of his employment at the

Manteno State Hospital, and an unconditional offer of reinstatement without prejudice to his employment rights is necessary to remedy such unlawful act by defendants.

12. That, as a direct consequence of the defendants' acts, the plaintiff, Joseph L. Donahue, did suffer damages for emotional harm, degradation and humiliation in the amount of Two Thousand Dollars ($2,000.00).

13. That, in the event the plaintiff, Joseph L. Donahue, accepts an offer of full and unconditional reinstatement to his former position and is in fact so reinstated, a writ of injunction should issue restraining and enjoining the defendants, and their agents and/or successors, from interfering with, coercing or discriminating against the plaintiff because he exercised his right to freedom of speech protected by the First and Fourteenth Amendments to the Constitution of the United States.

14. That the plaintiff's attorney, in preparation of the case, including consultations with client, investigation of facts, filing of suit, taking of depositions, preparing for trial and trial memorandum and actual time spent in trial, is entitled to a reasonable fee for services and that a reasonable fee for said services is Seven Hundred Fifty Dollars ($750.00).

Conclusions of Law.

1. This Court has jurisdiction over the subject matter of this action pursuant to and by virtue of the First and Fourteenth Amendments to the Constitution of the United States, Title 28 U. S. C. Section 1343 and Title 42 U. S. C. Section 1983.

2. The defendants Briggs, Staunton and Piepenbrink, as agents of the State of Illinois and of the Department of Mental Health, did act under the color of law, regulation, custom or usage of said State of Illinois and did discharge the plaintiff, Joseph L. Donahue, a citizen of the United States, from his employment at the Manteno State Hos-

pital, a State controlled and operated mental institution, for making public statements or otherwise exercising protected constitutional rights, and thereby did deprive plaintiff of his rights, privileges and immunities secured by the Constitution and laws of the United States.

3. The plaintiff, Joseph L. Donahue, should be offered full and unconditional reinstatement to his former position without prejudice to his employment rights; and that in the event the plaintiff accepts said offer and is so reinstated, a writ of injunction shall issue restraining and enjoining the defendants, their agents and successors, from interfering with, coercing or discriminating against the plaintiff in the exercise of his protected rights of free speech.

4. The plaintiff, Joseph L. Donahue, is entitled to recover from the defendants an amount equivalent to his out-of-pocket expenses suffered as a direct consequence of his discharge, plus the amount of Two Thousand Dollars ($2,000.00) punitive damages, plus interest, together with an attorney's fee of Seven Hundred Fifty Dollars ($750.00) and his costs of this action.

5. The defenses of governmental immunity and lack of jurisdiction are insufficient as a matter of law and must be dismissed.

6. This Court should and will retain jurisdiction of this cause to make any further orders or judgments as may be considered necessary, including the issuance of a writ of injunction and a determination of out-of-pocket expenses, if any.

It is so Ordered, and counsel for plaintiff will submit appropriate judgment in accordance therewith.

Dated at Chicago, Illinois, this 7th day of January, 1971.

/s/ R. B. Austin,
Richard B. Austin,
United States District Judge.

IN THE UNITED STATES DISTRICT COURT

* * (Caption—70-C-146) * *

JUDGMENT

This action came on for trial before the Court, Honorable Richard B. Austin, District Judge presiding, and the issues having been duly tried and a decision having been duly rendered, it is,

Ordered, Adjudged and Decreed that the plaintiff, Joseph L. Donahue, recover of the defendants, John F. Briggs, Patrick Staunton and H. C. Piepenbrink, the sum of Two Thousand Dollars ($2,000.00) as punitive damages, with interest thereon at the rate provided by law, together with his costs of this action herein incurred and expended, and attorney fees in the further sum of Seven Hundred Fifty Dollars ($750.00);

Further Ordered, Adjudged and Decreed that the defendants, John F. Briggs, Patrick Staunton and H. C. Piepenbrink, and/or their successors, offer to the plaintiff, Joseph L. Donahue, full and unconditional reinstatement to his position as Catholic Chaplain at the Manteno State Hospital, Manteno, Illinois, without prejudice to his employment rights;

Further Ordered, Adjudged and Decreed that the plaintiff, Joseph L. Donahue, recover of the defendants. John F. Briggs, Patrick Staunton and H. C. Piepenbrink, and/or their successors, an amount equal to out-of-pocket expenses incurred as a direct consequence of the discharge of the plaintiff from his position as Catholic Chaplain at the Manteno State Hospital;

Further Ordered, Adjudged and Decreed that this Court will retain jurisdiction of this cause to make any further orders or judgments as may be considered necessary, including the issuance of a writ of injunction and a determination of the out-of-pocket expenses, if any.

Dated at Chicago, Illinois this 7th day of January, 1971.

/s/ R. B. Austin,
Judge, United States District Court.

OPINION BY JUDGE HASTINGS
(DISSENT BY CHIEF JUDGE SWYGERT)

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JULY 6, 1972

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. JOHN S. HASTINGS, *Senior Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

JOSEPH L. DONAHUE,
Plaintiff-Appellee,

No. 71-1160

vs.

PATRICK STAUNTON, etc., et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, as modified, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

SEPTEMBER 15, 1972

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

JOSEPH L. DONAHUE,
Plaintiff-Appellee,

No. 71-1160

vs.

PATRICK STAUNTON, individually and as Chicago Area Zone Director, H. C. PIEPENBRINK, etc. et al.,
Defendants-Appellants.

On Petition for Rehearing.

The petition for rehearing is denied by a majority of the panel. Judge Swygert would grant the petition.

The request for a rehearing *en banc* is denied by a majority of the active members of the court. Judge Swygert would grant the petition.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-873

PATRICK STAUNTON, ET AL., *Petitioners*

v.

JOSEPH L. DONAHUE, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether the two lower courts reasonably concluded upon a sufficient evidentiary showing that, in violation of his right to freedom of speech guaranteed by the First Amendment of the United States Constitution made applicable to the States by the Fourteenth Amendment, Father Joseph L. Donahue was discharged by Illinois from his position as Catholic chaplain of the Manteno State Hospital because of his public criticism of conditions at that hospital, and that his public criticism did not detract from his ability to fulfill the requirements of his chaplaincy.

STATEMENT

Father Joseph L. Donahue was appointed Catholic chaplain at Manteno State Hospital on July 14, 1964, and served in that capacity until his discharge on December 4, 1969, nearly five and one-half years (Pet. A2). He ministered to the spiritual needs of the patients and employees at Manteno (*ibid.*). He also performed sundry other duties, including speaking at public functions to explain the operations of the hospital (*ibid.*). In his annual performance reviews preceding his discharge he was always rated "good" or "excellent" in seven separate categories of duties and responsibilities (Pet. A2-A3). In his most recent predischarge review, for the period from July 14, 1968 to July 14, 1969 (less than five months before his dismissal), his immediate superior praised his performance (A3):

> Father Donahue energetically and conscientiously discharges his duties as a spiritual advisor and counselor to the patients of Catholic faith at M. S. H. He has extremely favorable rapport with the patients to whom he provides the chaplaincy services, and at all times considers what is best for the patient.
>
> * * * * *
>
> Father Donahue constantly strives to bring about better conditions at M. S. H. and in doing so apprises the staff of changes that should be initiated in order to correct situations which are not acceptable for the care and treatment of the mentally ill. His ability to communicate with others concerning these problems and the presentation of his solutions leave little to misinterpretation. His strong initiative and precise communicating among employees and patients are attributes which make him an asset to M. S. H.

In the fall of 1969 Father Donahue publicly criticized hospital operations (Pet. A4). On October 20, 1969, a local newspaper carried a report of a critical speech he made (*ibid.*). On October 27, 1969, the same newspaper printed a letter to the editor he wrote criticizing a particular hospital program as impractical (Pet. A4-A5). On November 13, 1969, the same newspaper published a paid advertisement which he coauthored setting forth twelve specific incidents of negligence or improper activity at the hospital (Pet. A5). The advertisement charged that certain mental health officials were all "laymen" (*ibid.*). It assailed neglect in the preparation and funerals of the dead, want of effort to prevent runaways and improper treatment, and delay in treatment (*ibid.*). It questioned the legality of a self-medication program and asserted that the hospital lacked certain facilities (*ibid.*). It charged that untidy patients were mixed with tidy patients and that birth control pills were issued to highly promiscuous patients (*ibid.*). It recounted other incidents of neglect (*ibid.*).

Many of Father Donahue's accusations came from reports of the "Pharmacy & Therapeutics Committee Meetings" at the hospital and other inter-office memoranda (Pet. A5). Furthermore, as Father Donahue testified, he checked every charge he made either by direct observation, conversation with "reliable sources, doctors, nurses, security men and aides," or through a number of memoranda which came to his office (*ibid.*). Finally, as he testified, he never knowingly published or stated anything that was false (*ibid.*).

Because of his criticism of the hospital, Father Donahue was dismissed as chaplain on December 4, 1969 (Pet. A6, A2). He brought an action seeking

redress. The District Court found that "undesirable conditions did exist" at the hospital; that, "properly distressed" by these conditions, Father Donahue publicly criticized them; that his "public discussions relating to the existing conditions" were "proper and within the rights guaranteed under and protected by the First and Fourteenth Amendments to the United States Constitution"; that, "as a result of . . . speaking forth," Father Donahue was discharged; and that his discharge violated his rights under the First and Fourteenth Amendments (Pet. A26). The District Court entered a judgment ordering that Father Donahue be offered "full and unconditional reinstatement to his position as Catholic Chaplain at Manteno State Hospital . . ."; that he be indemnified for his "out-of-pocket expenses" resulting from his discharge; that, because of the "emotional harm, degradation and humiliation" he suffered (Pet. A27), he be paid $2,000; and that he be allowed attorney's fees in the sum of $750 (Pet. A29-30).

The Court of Appeals affirmed the judgment with immaterial modifications (Pet. A31). It identified the "principal issue" as Father Donahue's "First Amendment right to freedom of speech" (Pet. A6), and it addressed that issue in the light of the standard enunciated by this Court in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968) (Pet. A8). It quoted this Court's approach: "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" (Pet. A10). It listed the factors which comprise the State's interest (*ibid.*).

It observed that the only part of Father Donahue's office that possibly implicated these interests was speaking at public functions to explain hospital operations (*ibid.*). It discounted this activity as a marginal part of his position; it was not even evaluated until May 13, 1969, and Father Donahue's performance in it was then rated "good" (*ibid.*). Viewed in totality, the Court of Appeals appraised this part of his work as not "such a critical responsibility of a Chaplain as to give the State a strong enough interest to interfere with . . . [Father Donahue's] free speech rights" (*ibid.*). Focussing rather on the central aspect of his office, the Court of Appeals determined that it had not been shown that Father Donahue's public criticism "hindered him in the performance of his religious and spiritual duties toward the patients at Manteno" (*ibid.*). Accordingly, finding that nothing in his chaplaincy significantly suggested that silence was exactable of him as an employee, and finding further that Father Donahue "reasonably believed" his public criticism "to be true" and that it was "not knowingly false and recklessly made" (Pet. A7), the Court of Appeals concluded that the societal and individual interest in speaking out "on matters of public concern, such as mental health," outweighed any claim for suppression that the State had made as an employer (Pet. A11).

ARGUMENT

1. In *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), this Court fashioned the standard to be applied, and identified the competing interests to be evaluated, in determining whether an individual's right as a citizen to speak should be subordinated because his public criticism is said to collide with the discharge

of his job responsibilities as a governmental employee. The two courts below, correctly understanding the *Pickering* standard, applied it faithfully and sensitively. The situation to which the standard was applied is highly individualistic and the factors evaluated quite particularized and special. Given the unexceptionable perception of the controlling standard, and the concurrent determination of the two lower courts in applying it in discrete circumstances, no question is presented meriting review by this Court. "A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error." *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 214 (1948).

2. Petitioners play a number of variants on the theme of their asserted want of "bad faith." None merits this Court's review.

(a) To avoid answerability for abridging Father Donahue's First Amendment rights, Petitioners assert that they acted in good faith (Pet. 16-19). The argument founders on the finding that "defendants acted in bad faith . . ." (Pet. A13). Accordingly, there is no factual predicate for their argument.

To escape this barrier to their argument, Petitioners assert that the finding of bad faith was not made by the District Court, but by the Court of Appeals, and that the Court of Appeals lacks power to make findings (Pet. 27-29). But the Court of Appeals held that the finding existed as a "necessary implication" of the District Court's decision and judgment (Pet. A12 and n. 4). Furthermore, a Court of Appeals may decide the merits of an appeal in the absence of an explicit finding " 'if a full understanding of the question pre-

sented may be had without the aid of separate findings.'"[1] It may in its discretion either remand to the *nisi prius* trier to supply an arguably omitted finding, or it may decide the appeal without a remand if it believes that it is sufficiently informed of the factual posture of the controversy by the record as it exists. Whether, on a particular record, a Court of Appeals should exercise its discretion one way rather than another presents no question warranting this Court's review.

(b) Petitioners principally assert that they may discharge Father Donahue for speaking out so long as they act in good faith (Pet. 16-19). They say that a governmental employee's protection depends on a showing, not only that his governmental employer infringed his free speech rights, but that the employer committed the abridgment in bad faith. Their argument is barred by, and requires disregard of, the finding that they did act in bad faith. This aside, their argument is devoid of any merit. Repression of free speech is not justified because the suppressor's motive is pure. "It is of no consolation to an individual denied . . . [a constitutional right] that it was done in good faith." *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725 (1961).

(c) Petitioners secondarily assert that, even if they are subject to equitable relief, their good faith shields them from answerability in damages for the harm they caused (Pet. 27). The argument is again barred by the bad faith finding. And, bad faith aside, it again has no merit. When abridgment of a constitutional or statu-

[1] 5A Moore's Federal Practice ¶ 52.05[2], pp. 2720-2721 (1971); *Huard-Steinheiser, Inc.* v. *Henry*, 280 F.2d 79, 84 (C.A. 6, 1960).

tory right inflicts injury, compensation in damages to right the wrong is grantable as a matter of course.[2] It is frivolous to assert that the innocent victim of unconstitutional action should bear his own loss because the perpetrator of the wrong is pure in heart.

(d) Finally, Petitioners assert that, whatever may be true of compensatory damages, their good faith precludes recovery of punitive damages (Pet. 20, 27), and on that basis they protest the award of $2,000. But they grant that bad faith would justify punitive damages (Pet. 20), so that their argument is once more foreclosed by the bad faith finding. Furthermore, their argument is fundamentally flawed for another reason. While the judgment in the sum of $2,000 was denominated punitive (Pet. A28, A29, A12), this is a misnomer. The judgment was based on the finding that, "as a direct consequence of the defendants' acts, the plaintiff, Joseph L. Donahue, did suffer damages for emotional harm, degradation and humiliation in the amount of Two Thousand Dollars ($2,000.00)" (Pet. A27). Father Donahue thus recovered $2,000 to compensate him for mental distress and indignity, and recovery for such harm is compensatory, not punitive.[3] Accordingly, no question is presented concerning a sufficient basis for recovering punitive damages.

In sum, Petitioners play variations on the theme of their asserted good faith, but the merits of their argu-

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[2] *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 395-397 (1971); *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 238-240 (1969); *Bell* v. *Hood*, 327 U.S. 678, 684 (1946).

[3] McCormick, Damages, 315-316 (1935); Restatement, Contracts, § 342, Comment a (1932); 22 Am. Jur. 2d, Damages, § 197 (1965).

ments cannot even be reached without first displacing the finding of bad faith. Furthermore, even were the finding penetrable, nothing is presented warranting review.

3. Petitioners claim that the decision below conflicts with *Jenson* v. *Olson*, 353 F.2d 925 (C.A. 8, 1965) (Pet. 22). No conflict exists. *Jenson* antedated this Court's decision in *Pickering*, and the hegemonic role that *Jenson* ascribed to the government as employer was repudiated by *Pickering*. Accordingly, the Court of Appeals in this case correctly found "*Jenson* to be unpersuasive, mainly because it no longer represents the prevailing thought in this area. See *Keyishan* v. *Board of Regents*, 385 U.S. 589 (1967) and *Pickering* v. *Board of Education*, 391 U.S. 563 (1968)" (Pet. A8). Petitioners are simply unreconciled to their obligation to respect the free speech rights of their employees.

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be denied.

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